UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2010 MSPB 123

Docket No. SF-3330-09-0570-I-1

Michael B. Graves,

Appellant,

v.

Department of Veterans Affairs,

Agency.

June 30, 2010

Michael B. Graves, Los Angeles, California, pro se.

Evan Stein, Esquire, Los Angeles, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that denied corrective action in his Veterans Employment Opportunities Act (VEOA) appeal. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115, FIND that the agency violated the appellant's veterans' preference rights, and REMAND the case for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 On May 14, 2009, the appellant filed a VEOA appeal of his non-selection for a Medical Records Technician/Coder (MRT) position under vacancy announcement number 08-210 in the agency's Long Beach, California Healthcare System. Initial Appeal File (IAF), Tabs 1, 6, subtabs 2(a), 2(d), 2(e), 2(g). The vacancy opening date was October 20, 2008, it was an open continuous announcement, and the pay plan/series/grade listed was GS-675-4/5/6/7/8.[1] *Id.*, Tab 6, subtab 2(a) at 1. The MRT position is a Title 38 "hybrid" position under 38 U.S.C. § 7401(3). *Id.*, Tab 6, subtabs 1 at 1, 2(a), 2(b). The agency moved to dismiss the appeal for lack of jurisdiction. *Id.*, Tab 6, subtab 1. During the processing of the appeal, the administrative judge determined that the Board has jurisdiction over the appeal under VEOA. *Id.*, Tab 27 at 6. The administrative judge held a hearing on August 13, 2009. ID at 2.

¶3 In his September 11, 2009 initial decision, the administrative judge found that the Board has jurisdiction over a VEOA appeal filed by an applicant for a hybrid position under 38 U.S.C. § 7401(3) pursuant to 38 U.S.C. § 7403(f)(3) and 5 U.S.C. § 3330a(d). He concluded that the Board has jurisdiction over this appeal because the appellant is a preference eligible, he exhausted his remedy before the Department of Labor (DOL), and the actions at issue took place on or after October 30, 1998. The administrative judge further found that the appellant asserted that the agency violated his veterans' preference rights under, among other provisions, 38 U.S.C. § 7403(f)(2). The administrative judge found that this constituted a non-frivolous allegation that the agency violated the appellant's veterans' preference rights. ID at 10-11.

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[1] The appellant submitted a vacancy announcement with the same number, which also included grade 9 and had an opening date of September 2, 2008. IAF, Tab 15, Ex. 1; Initial Decision (ID) at 2 n.2.

¶4 However, the administrative judge further found that the scope of the appeal is limited because, although § 7403(f)(2) requires that the agency apply the "principles of preference" established under 5 U.S.C. Chapter 33 in hiring veterans, 38 U.S.C. § 7405(a) provides that the agency may appoint individuals to § 7401(3) positions without regard to civil service requirements. He thus found that the agency, through its handbooks, instructions, and guidance, could properly require veterans to possess qualifications that are approximately equal to other candidates before giving them hiring preference. ID at 3-6, 10-11; *see also* IAF, Tab 6, subtab 2i.

¶5 The administrative judge found that the appellant failed to establish that the agency violated 38 U.S.C. § 7403(f)(2), or the agency's policy, by not applying veterans' preference to his application. ID at 2, 11-13. He found that the agency originally intended to fill two MRT positions, one at the GS-6/7/8 level and one at the GS-4/5 trainee level. ID at 2, 6. He found that, prior to receiving the appellant's application on January 30, 2009, the agency had already selected non-preference eligible Paula Glover for the GS-6/7/8 level position. *Id.* at 2, 6-7, 12. In that regard, he found that the referral of applications individually for consideration did not violate the agency's duty under 38 U.S.C. § 7403(f)(2) or the agency's policy to apply veterans' preference principles in hiring. *Id.* at 12. The administrative judge also found that the agency subsequently decided not to fill the GS-4/5 trainee level position. *Id.* at 6, 13. He found that the agency's decision not to make a selection, not to fill a vacancy, or to cancel a vacancy announcement did not violate statutory or regulatory requirements or the agency's policy regarding veterans' preference. *Id.* at 13-14.

¶6 The administrative judge found without merit the appellant's argument that the agency denied him his right to compete for this vacancy under 5 U.S.C. § 3304(f)(1). ID at 14-15. He similarly found without merit the appellant's contentions that the agency committed procedural errors because, in a VEOA appeal, the only issue is whether the agency violated a law or regulation relating

to veterans' preference. *Id.* at 15. He further found that the appellant's apparent assertion that the agency violated his rights as a 10-point preference eligible by not allowing him to submit a late application failed on multiple grounds, including irrelevancy because the agency received his application while the vacancy announcement was still open. *Id.* at 15-16. He found that the appellant's additional apparent claim that he should have received consideration as a Veterans Recruitment Appointment (VRA) candidate similarly failed because the agency was not making a VRA appointment. *Id.* at 16-17.

¶7 The administrative judge found that the Board lacks jurisdiction over the appellant's claim that the agency should have established an affirmative action plan for veterans. ID at 17. He also found that the Board lacks jurisdiction over the appellant's allegations of discrimination, prohibited personnel practices, and harmful procedural error. *Id.* at 15, 17-18.

¶8 On September 15, 2009, the appellant filed a motion for certification of an interlocutory appeal concerning the administrative judge's denial of his various motions. IAF, Tab 39. On October 14 and November 7, 2009, he filed a petition for review and a "Point and Authority." Petition for Review (PFR) File, Tabs 1, 3. The agency filed a response opposing the petition for review. *Id.*, Tab 4. After the record closed on review, *id.*, Tab 2, the appellant filed additional submissions, *id.*, Tabs 5, 6.

ANALYSIS

The agency must comply with the requirements set forth in Title 5 of the United States Code in filling hybrid positions under 38 U.S.C. § 7401(3), and the Board will determine any violation of those requirements by analyzing Title 5 provisions.

¶9 The administrative judge correctly found that the Board has VEOA jurisdiction over appeals from applicants for hybrid positions under 38 U.S.C. § 7401(3). He incorrectly found, however, that the agency could limit its consideration of such applicants' veterans' preference by handbooks, instructions

and guidance, and, in essence, use veterans' preference status as a "tie-breaker" to select between qualified candidates. We find that the agency's use of veterans' preference status as a "tie-breaker" in its selection process is inadequate and that the agency must comply with the competitive service veterans' preference requirements set forth in Title 5 of the United States Code in filling positions under 38 U.S.C. § 7401(3).

¶10 Certain medical positions in the Veterans Health Administration (VHA) are governed by Title 38. Those positions are identified in 38 U.S.C. § 7401(1) through (3). Section (1) covers physicians, dentists, podiatrists, chiropractors, optometrists, registered nurses, physician assistants, and expanded-function dental auxiliaries; section (2) covers scientific and professional personnel, such as chemists and microbiologists; and section (3) covers a wide range of other medical positions, including MRTs.

¶11 Positions identified in 38 U.S.C. § 7401 are in the excepted service and the Secretary of Veterans Affairs has the authority to establish qualifications for the positions. *See* 38 U.S.C. §§ 7402(b)(14), 7403(f)(1)(A); *Carrow v. Merit Systems Protection Board*, 564 F.3d 1359, 1362 (Fed. Cir. 2009) (explaining that one of the changes effected by the Veterans Health Care, Capital Asset, and Business Improvement Act of 2003, Pub. L. No. 108-170, §§ 301-304, 117 Stat. 2042, 2054-60, was the expansion of the "hybrid" Title 38 personnel system to include several classes of employees that had previously been in the competitive service). By statute, many of the positions are filled "without regard to civil-service requirements." 38 U.S.C. §§ 7403(a)(1), 7405(a). The U.S. Court of Appeals for the Federal Circuit has held that Title 5 provisions (the "civil service requirements"), including those regarding veterans' preference rights, do not apply to appointments made "without regard to civil service requirements." *Scarnati v. Department of Veterans Affairs*, 344 F.3d 1246, 1248 (Fed. Cir. 2003) (construing 38 U.S.C. § 7403(a)); *see also Vores v. Department of Veterans Affairs*, 113 F. App'x 916, 918 (Fed. Cir. 2004) (finding that similar language in

38 U.S.C. § 7406 meant that 5 U.S.C. § 3330a "cannot override the discretionary power given to the VHA to select [medical] residents under 38 U.S.C. § 7406").[2]

¶12 Unlike other VHA medical professionals appointed under Title 38, however, employees in § 7401(3) positions retain many Title 5 rights, including adverse action and reduction-in-force appeal rights. 38 U.S.C. § 7403(f)(3). Moreover,

> [i]n using such authority to appoint individuals to such positions, the Secretary shall apply the principles of preference for the hiring of veterans and other persons established in subchapter I of chapter 33 of title 5.

38 U.S.C. § 7403(f)(2). "[T]he applicability of the principles of preference referred to in paragraph (2) . . . shall be resolved under the provisions of title 5 as though such individuals had been appointed under that title." 38 U.S.C. § 7403(f)(3). In other words, Title 5 competitive service veterans' preference requirements apply to appointments made for 38 U.S.C. § 7401(3) positions, such as MRTs. *See* 5 U.S.C. § 3320 (selection for appointment in the excepted service must be made "in the same manner and under the same conditions required for the competitive service by sections 3308-3318 of this title"). Therefore, the agency's policy of using veterans' preference essentially as a tie-breaker for equally qualified applicants is insufficient as it does not provide Title 5 competitive service veterans' preference principles in considering applicants for hybrid positions under 38 U.S.C. § 7401(3).

The agency violated the appellant's veterans' preference rights.

¶13 To be entitled to relief under VEOA, the appellant must prove by preponderant evidence that the agency's action violated one or more of his statutory or regulatory veterans' preference rights in its selection process. *Dale*

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[2] The Board has held that it may rely on unpublished decisions of the U.S. Court of Appeals for the Federal Circuit if it finds the court's reasoning persuasive. *Scott v. Department of the Air Force*, 113 M.S.P.R. 434, ¶ 10 n.4. (2010).

v. Department of Veterans Affairs, 102 M.S.P.R. 646, ¶ 10, *review dismissed*, 199 F. App'x 948 (Fed. Cir. 2006). Here, the appellant asserted, inter alia, that the agency violated his veterans' preference rights by selecting Glover for the MRT position instead of him. IAF, Tabs 1, 7, 9.

¶14 We find that, contrary to the administrative judge's finding, the evidence shows that the appellant's application was pending before the agency when it selected Glover for the MRT position. The agency received the appellant's application on January 30, 2009. IAF, Tab 6, subtab 2d. Based on the totality of the record evidence, we find that Glover's selection date was February 19, 2009. The Referral for Interview form for Glover shows that the agency selected her on February 19, 2009, that no actions to complete the appointment process (physical, contact of employer, etc.) were taken until March 2009, and that the "confirmed entry on duty date" was May 26, 2009. *Id.*, subtab 2c. Additionally, the record contains a February 20, 2009 memorandum from the selecting official, Health Information Management Systems Chief Melissa Ottem, to Medical Center Director Isabel Duff requesting approval to hire a qualified Coder. The individual Ottem wished to hire is described in the memorandum as a qualified candidate who applied in June 2008, was interviewed, and was "Boarded." IAF, Tab 25, Ex. 2. This matches the description of Glover. *See id.*, Exs. 2, 4 at 4 (Glover's original application date of June 4, 2008, is stricken and changed to March 26, 2009). Moreover, in its narrative submissions to the Board, the agency repeatedly stated that Glover's selection date was February 19, 2009. *E.g.*, IAF, Tab 6 at 5, Tab 20 at 8, Tab 25 at 1. Although these submissions are not evidence, they represent the agency's position regarding the selection date. *See Lamberson v. Department of Veterans Affairs*, 80 M.S.P.R. 648, ¶ 16 (1999) (noting the existence of the doctrine of judicial estoppel, which is used by courts to "bar[ ] a party from adopting inconsistent positions in the same or related litigation").

¶15 The contrary documentary evidence is a June 1, 2009 letter from the agency's Chief of Human Resources Service to DOL's Veterans Employment and Training (VETS) indicating that it made its selection on January 16, 2009. IAF, Tab 24, Ex. A. There is also contrary hearing testimony from Lead Human Resources Specialist Iris Jones and Ottem. Jones testified that she "believed" Glover was "tentatively selected" in November or December 2008, her application was submitted for review to the agency's Professional Standards Board, that Board "appointed" her, and she went through the pre-employment process. However, she also testified that she had no involvement in Glover's selection. Hearing CD. Thus, her testimony on this topic is of little value. Ottem initially agreed during her testimony that Glover was selected on February 19, 2009. She later testified that she signed the selection document on February 19, 2009, because she had selected Glover in late 2008, but did not understand the selection process or what she had to sign at what time until sometime in 2009. Hearing CD. She testified that she should have signed the selection document earlier, but did not do so. *Id.*

¶16 The letter to DOL and the cited hearing testimony conflict with the record documents that were contemporaneous with Glover's selection. For example, there was no explanation regarding why Ottem requested Duff's approval to hire Glover on February 20, 2009, if Glover had been selected in January 2009 or before. Thus, the testimony and letter to DOL appear to reflect the agency's post hoc characterization of the events, and as such, they are not as credible as the contemporaneous documents. *See Estate of Kravitz v. Department of the Navy*, 110 M.S.P.R. 97, ¶¶ 11-15 (2008) (the Board rejected the agency's post hoc characterization of the events regarding the appellant's application for certain positions); *Grubb v. Department of the Interior*, 96 M.S.P.R. 377, ¶ 43 (2004) (the Board found the appellant's post hoc explanation for her absence "not very credible" where it was markedly different from the reason she initially presented and was not supported by corroborating medical evidence). The administrative

judge credited the testimony of Jones and Ottem without making actual credibility determinations regarding the testimony and without truly considering the contrary documentary evidence. ID at 6-9, 12-13; *see Haebe v. Department of Justice*, 288 F.3d 1288, 1302 (Fed. Cir. 2002).

¶17 We find that, even if the cited testimony were credible, a "tentative selection" is insufficient to preempt the appellant's veterans' preference rights; a selection is not operative until it is "official." We find that the agency did not officially select Glover until February 19, 2009, and, accordingly, the appellant's January 30, 2009 application was pending before the agency at the same time as Glover's application.

¶18 The agency violated the appellant's veterans' preference rights, including those related to the provisions of 5 U.S.C. §§ 3317 and 3318, in selecting Glover for the MRT position. Section 3317 provides, in relevant part, as follows:

> (a) The Office of Personnel Management shall certify enough names from the top of the appropriate register to permit a nominating or appointing authority who has requested a certificate of eligibles to consider at least three names for appointment to each vacancy in the competitive service.

Section 3318 provides, in relevant part, as follows:

> (a) The nominating or appointing authority shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under section 3317(a) of this title, unless objection to one or more of the individuals certified is made to, and sustained by, the Office of Personnel Management for proper and adequate reason under regulations prescribed by the Office.
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> (b)(1) If an appointing authority proposes to pass over a preference eligible on a certificate in order to select an individual who is not a preference eligible, such authority shall file written reasons with the Office for passing over the preference eligible. The Office shall make the reasons presented by the appointing authority part of the record of the preference eligible and may require the submission of more detailed information from the appointing authority in support of the passing over of the preference eligible. The Office shall determine the sufficiency or insufficiency of the reasons submitted

> by the appointing authority, taking into account any response received from the preference eligible under paragraph (2) of this subsection. When the Office has completed its review of the proposed passover, it shall send its findings to the appointing authority and to the preference eligible. The appointing authority shall comply with the findings of the Office.
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> . . . .
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> (3) A preference eligible not described in paragraph (2) of this subsection, or his representative, shall be entitled, on request, to a copy of - (A) the reasons submitted by the appointing authority in support of the proposed passover, and (B) the findings of the Office.
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> . . . .

¶19 Thus, an examining authority is supposed to certify "enough names from the top of the appropriate register" to permit the appointing authority "to consider at least three names for appointment to each vacancy." 5 U.S.C. § 3317(a). The appointing authority "shall select for appointment to each vacancy from the highest three eligibles available for appointment on the certificate furnished under section 3317(a)." 5 U.S.C. § 3318(a).

¶20 The agency admittedly did not comply with these provisions because, as previously discussed, it did not believe that it had to comply with Title 5 competitive service veterans' preference requirements in making an appointment to an MRT position and it considered Glover's application alone. This constitutes a violation of the appellant's veterans' preference rights. *See Endres v. Department of Veterans Affairs*, 107 M.S.P.R. 455, ¶¶ 10, 20 (2007).

¶21 The agency also violated the pass over process in this case. As set forth above, the relevant statute provides that if an appointing authority "proposes to pass over a preference eligible . . . in order to select an individual who is not a preference eligible, such authority shall file written reasons with [the Office of Personnel Management] for passing over the preference eligible" and obtain the Office of Personnel Management's approval. 5 U.S.C. § 3318(b)(1); *see Gingery v. Department of Defense*, 550 F.3d 1347, 1352-54 (Fed. Cir. 2008); *Endres*, 107 M.S.P.R. 455, ¶ 10. OPM has promulgated a regulation delegating to agencies

the authority to adjudicate pass over requests in matters involving 5-point preference eligibles, and 10-point preference eligibles with service-connected disabilities of less than 30 percent, except in a few circumstances that are not applicable here. 5 C.F.R. § 332.406(a). The agency did not follow the pass over process, which constitutes a separate violation of the veterans' preference rules. The agency was required to comply with these provisions, and all relevant Title 5 veterans' preference statutes and regulations in making the selection at issue here.

The appeal must be remanded to determine the type of veterans' preference to which the appellant is entitled.

¶22 With regard to the type of preference to which the appellant is entitled, a remand is warranted. It is undisputed that the appellant is entitled to a 5-point preference, at a minimum. IAF, Tab 6, subtab 2d at 4 (DD 214); Tab 20 at 7. The type of preference is significant because, if the appellant was entitled to a 10-point preference and the agency did not properly credit him, that would be a separate veterans' preference violation. If a veteran is receiving compensation for a disability of 10 percent or more, as the appellant claims that he is, his name ranks above those of others referred for consideration. 5 U.S.C. § 3313(2); *Brandt v. Department of the Air Force*, 103 M.S.P.R. 671, ¶ 6 (2006); 5 C.F.R. § 332.401(b).

¶23 The administrative judge concluded that the appellant did not establish his entitlement to a 10-point preference before the agency because he did not include proof of his entitlement to that preference with his application. ID at 13 n.8. However, the administrative judge never informed the appellant that he needed to establish that or how he could do so. The administrative judge also failed to cite any authority supporting his position that the appellant had to submit proof of his 10-point preference eligibility with his application.

¶24 Before the Board, the appellant declared under penalty of perjury in a notarized statement that he is a 20 percent service-connected disabled veteran. IAF, Tab 17 at 2. In his application, the appellant stated that he is a 20 percent

disabled veteran and he checked the box claiming a 10-point preference. *Id.*, Tab 6, subtab 2d at 1, 3. The application form indicated at the 10-point veterans' preference box that an applicant should "[a]ttach an Application for 10-Point Veterans' Preference (SF 15) and proof required," but it did not indicate what kind of proof. *Id.* at 3. The vacancy announcement requested, among other application materials, a DD 214 and an "SF-15, Application for 10-point Veteran Preference (If Applicable)." IAF, Tab 6, subtab 2a at 1. It is entirely possible that if the appellant already knew he was eligible for a 10-point preference due to his Department of Veterans Affairs' disability rating, he would not have understood from these documents that he needed to submit another SF-15 to "apply" for that preference again.

¶25 In its June 1, 2009 letter to DOL VETS, the agency's Chief of Human Resources Service represented that the appellant did not submit proof of entitlement to a 10-point preference. IAF, Tab 24, Ex. A. However, it is unclear whether the agency ever contacted him to attempt to obtain this information, when proof of his preference was required, and, given the agency's error in believing that Title 5 provisions did not apply in this matter, whether it mattered to the agency whether his preference was 5 or 10 points. Jones testified that Title 5 veterans' preference rules had nothing to do with this case because Title 38 was completely different than Title 5 and because the appointment at issue was a non-competitive one. Hearing CD. Ottem testified that she did not review applications for preference eligibility, even if a DD 214 was submitted, and that veterans' preference was to be considered only if applicants had equal qualifications. Hearing CD.

¶26 OPM's Delegated Examining Operations Handbook (Handbook) at 85 provides that proof of veterans' preference status is required: (1) "[w]hen such status is used as a basis for accepting an application after the closing date"; (2) "[w]hen positions are restricted to preference eligibles"; or (3) "[p]rior to final selection if the preference eligible was selected over other eligibles based on his

or her eligibility for veterans' preference." The first two categories are not applicable in this case. The third indicates that the absence of proof of veterans' preference status at the application stage would not have been fatal to his 10-point preference claim. We note that a separate section of the Handbook addressing incomplete applications indicates that if an applicant does not submit a required form or other material as specified in the job announcement, the agency may rate the application based on the information provided, or may ask the applicant for the missing information, but must apply its option consistently for all applicants. Handbook at 77. The incomplete application section does not address veterans' preference information specifically, except in the context of applicants who are currently on active military duty and do not have a DD 214. For those individuals, the Handbook instructs that "*[p]rior to appointment*, you should verify: The eligible's entitlement to veterans' preference . . . ." Handbook at 77 (emphasis supplied). The OPM's VetGuide at 4 indicates that "[a]pplicants claiming 10-point preference must complete Standard Form (SF) 15, Application for 10-Point Veteran Preference, and submit the requested documentation," however it does not state what the "requested documentation" is or when such documentation must be provided. It also fails to address the agency's obligations, if any, to obtain the proper documentation to verify 10-point preference eligibility.

¶27 Based on the foregoing, we do not have sufficient information in the record before us to determine whether the appellant was entitled to be considered as a 10-point preference eligible by the agency.[3] Therefore, we instruct the administrative judge to take evidence and argument to clarify the issue.

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[3] In reaching this conclusion, we recognize that we have found in another appeal that the appellant proved that he is a 10-point preference eligible. *Graves v. Department of Veterans Affairs*, 2010 MSPB 118, ¶ 11. That case, however, concerned the appellant's application for an MRT position in the agency's West Los Angeles, California duty location under vacancy announcement no. 08-1181. MSPB Docket No. SF-3330-09-0725-I-1 Appeal File, Tab 22, Exhibits 8, 9; Tab 27 at 2-3. That finding, however, does

The appellant failed to prove by preponderant evidence that the agency violated his veterans' preference rights by not selecting him for another vacant position.

¶28 The appellant has failed to prove by preponderant evidence that the agency violated his veterans' preference rights by not selecting him for another MRT vacancy. The written record shows as follows: The appellant was rated qualified for an MRT position and referred for consideration to Ottem on March 13, 2009. IAF, Tab 6, subtab 2e. On or about March 18, 2009, Ottem requested to cancel her request to fill the vacant position and to close vacancy announcement number 08-210. *Id.*, subtab 2f. On March 24, 2009, Ottem indicated that the appellant was "not selected," noting he "lack[ed] current coding experience." *Id.*, subtab 2e. On April 9, 2009, Jones sent the appellant a letter notifying him that he was qualified for the position and referred for consideration, but not selected. *Id.*, subtab 2g.

¶29 Ottem testified that she had decided not to fill the second vacancy before she reviewed the appellant's application. Specifically, she testified that she had intended to fill the second vacancy at the GS-4/5 trainee level, but that the person who would have trained the selectee was no longer available to do so. Ottem testified that no one besides Glover was appointed to an MRT position. Hearing CD. The agency's decision to cancel the vacancy announcement before filling the second vacancy was within its authority and did not violate the appellant's veterans' preference rights. *See Abell v. Department of the Navy*, 343 F.3d 1378, 1383-84 (Fed. Cir. 2003). Thus, the appellant has not shown that the agency violated his veterans' preference rights in canceling the vacancy announcement without appointing a second person to an MRT position.

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not resolve the question in this appeal of whether the appellant provided the agency with sufficient documentation regarding his preference eligibility to require it to consider him as a 10-point preference eligible with respect to his application here for an MRT position at the agency's Long Beach, California duty location under vacancy announcement no. 08-210. IAF, Tabs 1, 6, subtabs 2(a), 2(d), 2(e), 2 (g).

The appellant failed to sustain his burden of proving by preponderant evidence that the agency violated VEOA by denying him the right to compete.

¶30 The appellant also asserted that he was denied the right to compete for the vacancy under 5 U.S.C. § 3304(f)(1). IAF, Tabs 3, 5. That provision states that "[p]reference eligibles or veterans who have been separated from the armed forces under honorable conditions after 3 years or more of active service may not be denied the opportunity to compete for vacant positions for which the agency making the announcement will accept applications from individuals outside its own workforce under merit promotion procedures." 5 U.S.C. § 3304(f)(1). The agency, however, did not use merit promotion procedures in filling this position. IAF, Tab 6, subtab 2a; Tab 24, Ex. A. Nor is there any indication that the vacancy should have been filled using merit promotion procedures.

ORDER

¶31 Accordingly, we REMAND this case for the administrative judge to take further evidence and argument and to make a determination on the issue of whether the appellant is entitled to a 10-point preference. He shall then issue a new initial decision concerning that issue and incorporating the findings of this Opinion and Order. The new initial decision shall ORDER the agency to reconstruct the selection process under vacancy announcement number 08-210 in accordance with Title 5 veterans' preference requirements, including, but not limited to 5 U.S.C. §§ 3317 and 3318 as follows: (1) The agency must remove Glover as the selectee for the MRT position in question because her placement in that position is contrary to 5 U.S.C. § 3318; (2) the certificate of eligibles under vacancy announcement number 08-210 must contain at least three names for appointment in order for the appointing authority to validly make a selection for the MRT position under 5 U.S.C. §§ 3317 and 3318; (3) preference eligibles who hold the same score as non-preference eligibles must be placed ahead of the non-preference eligibles; (4) if the administrative judge determines that the appellant is entitled to a 10-point preference, he should be entered onto the register in order

of his rating ahead of all remaining applicants; and (5) if the agency wishes to select an applicant who was a non-preference eligible as of February 19, 2009, over the appellant for the MRT position, the agency must obtain evidence of OPM's approval under 5 U.S.C. § 3318(b)(1), or, if the agency had delegated authority from OPM to adjudicate pass overs as of February 19, 2009, evidence of approval from its pass over adjudication office under 5 C.F.R. § 332.406(a).

¶32 The new initial decision shall also ORDER the agency to submit proof of compliance with the above instructions no later than 15 days after the date of the administrative judge's decision. If the agency, however, wishes to obtain approval to pass over the appellant and cannot comply within the above deadline, the agency will be ORDERED to submit evidence within the 15-day deadline that it has petitioned for pass over authority.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.